

ALABAMA DEPARTMENT OF  
ENVIRONMENTAL MANAGEMENT

IN THE MATTER OF

HERITAGE CONSTRUCTION COMPANY INC  
CHARLESTON APARTMENTS  
MOBILE, T5S, R2W, S8,  
MOBILE COUNTY, ALABAMA  
NPDES REGISTRATION NO. ALR16EBS5

ORDER 11-XXX-WP

PREAMBLE

This Special Order by Consent is made and entered into by the Alabama Department of Environmental Management (hereinafter "Department" or "ADEM"), and Heritage Construction Company Inc. (hereinafter "Operator") pursuant to the provisions of the Alabama Environmental Management Act, Ala. Code §§ 22-22A-1 to 22-22A-16 (2006 Rplc. Vol.), the Alabama Water Pollution Control Act (hereinafter "AWPCA"), Ala. Code §§ 22-22-1 to 22-22-14 (2006 Rplc. Vol.) and the regulations promulgated pursuant thereto, and § 402 of the Federal Water Pollution Control Act, 33 U.S.C. § 1342.

STIPULATIONS

1. The Operator is an Alabama developer constructing the residential development Charleston Apartments (hereinafter "Facility") located in T5S, R2W, S8, off of Sollie Road in Mobile, Mobile County, Alabama. Sediment and other pollutants in stormwater runoff from the Facility have the potential to discharge and/or have discharged to Milkhouse Creek and Second Creek, both waters of the State.

2. The Department is a duly constituted department of the State of Alabama pursuant to Ala. Code §§ 22-22A-1 to 22-22A-16 (2006 Rplc. Vol.).

3. Pursuant to Ala. Code § 22-22A-4(n) (2006 Rplc. Vol.), the Department is the state agency responsible for the promulgation and enforcement of water pollution control regulations in accordance with the Federal Water Pollution Control Act, 33 U.S.C. §§ 1251 to 1387. In addition, the Department is authorized to administer and enforce the provisions of the Alabama Water Pollution Control Act, Ala. Code §§ 22-22-1 through 22-22A-14 (2006 Rplc. Vol.).

4. The following references and acronyms are used in this Order and, when used, shall have the meaning of the name or title referenced below.

BMPs	Best Management Practices
CBMPP	Construction Best Management Practices Plan
NOR	Notice of Registration
NOV	Notice of Violation
NPDES	National Pollutant Discharge Elimination System
QCP	ADEM-recognized Qualified Credentialed Professional
UT	Unnamed Tributary

5. ADEM Admin. Code r. 335-6-12-.21(1) provides that “commencement and/or continuation of NPDES construction activity is prohibited... unless effective BMPs are implemented and maintained in accordance with a CBMPP prepared/certified by a QCP as adequate to meet the requirements of ADEM Admin. Code chap. 335-6-12 and applicable requirements of ADEM Administrative Code Division 335-6.” The CBMPP and any BMPs shall meet or exceed the technical standards of ADEM Admin. Code chap. 335-6-12, and the Alabama Handbook For Erosion Control, Sediment Control, And Stormwater Management On Construction Sites And Urban Areas published by the Alabama Soil and Water Conservation Committee (hereinafter the “Alabama Handbook”).

6. ADEM Admin. Code r. 335-6-12-.35(10) requires operators to promptly take all reasonable steps to determine the nature and impact of non-complying discharge, and to remove, to the maximum extent practical, pollutants deposited offsite or in any waterbody.

7. The Department inspected the Facility on September 16, 2009, and documented that the Operator had not properly implemented and maintained effective BMPs, resulting in discharges of sediment and other pollutants in stormwater runoff to wetlands associated with Milkhouse and Second Creek. In addition, during the inspection, significant accumulations of sediment resulting from discharges at the Facility were observed by the Department offsite.

8. On October 28, 2009, NOV was sent to the Operator by the Department as a result of the September 16, 2009, inspection. The NOV notified the Operator of deficiencies documented at the Facility, and required the Operator to submit to the Department a report prepared by a QCP showing steps that were taken at the Facility to correct the noted violations within thirty days of

receipt of the NOV. The Department received a report on November 23, 2009, detailing the scope of work to be completed at the facility. The Department received updates of the progress at the facility on February 11, 2010, March 11, 2010, March 18, 2010, and April 21, 2010. A statement of completion for all corrective actions except sediment removal from wetland areas was sent on April 21, 2010 by the Operator's QCP.

9. The Department inspected the Facility on May 6, 2010, and documented that the Operator had, again, not properly implemented and maintained effective BMPs resulting in discharges of sediment and other pollutants in stormwater runoff to wetlands of Second Creek and Milkhouse Creek and impacts to an UT to Second Creek. In addition, during the inspection, significant accumulations of sediment resulting from discharges at the Facility were observed by the Department offsite and in wetlands associated with Milkhouse and Second Creeks.

10. The Operator violated ADEM Admin. Code r. 335-6-12-.21(1) by commencing and/or continuing NPDES construction activity without having implemented effective BMPs that meet or exceed the technical standards of ADEM Admin. Code chap. 335-6-12, the site CBMPP, and the Alabama Handbook. Furthermore, the Operator violated ADEM Admin. Code r. 335-6-12-.35(10) by failing to take all reasonable steps to determine the nature and impact of non-complying discharge and to remove, to the maximum extent practical, pollutants deposited offsite or in any waterbody.

11. The Operator consents to abide by the terms of the following Consent Order and to pay the civil penalty assessed herein.

12. The Department has agreed to the terms of this Consent Order in an effort to resolve the violations cited herein without the unwarranted expenditure of State resources in further prosecuting the above alleged violations. The Department has determined that the terms contemplated in this Consent Order are in the best interests of the citizens of Alabama.

#### CONTENTIONS

13. Pursuant to Ala. Code § 22-22A-5(18)c. (2006 Rplc. Vol.), in determining the amount of any penalty, the Department must give consideration to the seriousness of the violations, including any irreparable harm to the environment and any threat to the health or safety of the

public; the standard of care manifested by such person; the economic benefit which delayed compliance may confer upon such person; the nature, extent and degree of success of such person's efforts to minimize or mitigate the effects of such violations upon the environment; such person's history of previous violations; and the ability of such person to pay such penalty. Any civil penalty assessed pursuant to this authority shall not be less than \$100.00 or exceed \$25,000.00 for each violation, provided however, that the total penalty assessed in an order issued by the Department shall not exceed \$250,000.00. Each day such violation continues shall constitute a separate violation. In arriving at this civil penalty, the Department has considered the following:

A. SERIOUSNESS OF THE VIOLATIONS: The Department noted four violations of ADEM Admin. Code chap. 335-6 and the AWPCA. The Department considered the general nature of each violation, the magnitude and duration of each non-compliant discharge and any available evidence of irreparable harm to the environment or threat to the public.

B. THE STANDARD OF CARE: In considering the standard of care manifested by the Operator, the Department noted that violations continued to be observed at the Facilities after issuing less formal enforcement.

C. ECONOMIC BENEFIT WHICH DELAYED COMPLIANCE MAY HAVE CONFERRED: The Operator has avoided and/or delayed certain costs associated with obtaining/maintaining a valid NPDES registration and proper implementation and maintenance of BMPs. Based on the Department's estimates of these costs and the timeframe of non-compliance, the Department believes that the Operator derived an economic benefit from these violations.

D. EFFORTS TO MINIMIZE OR MITIGATE THE EFFECTS OF THE VIOLATIONS UPON THE ENVIRONMENT: The Department is unaware of any efforts by the Operator to minimize or mitigate the effects of the violations upon the environment.

E. HISTORY OF PREVIOUS VIOLATIONS: The Department is unaware of any history of previous violations not otherwise addressed by this Order.

F. THE ABILITY TO PAY: The Department is unaware of any evidence regarding the Operator's inability to pay the civil penalty.

G. OTHER FACTORS: It should be noted that this Special Order by Consent is a negotiated settlement and, therefore, the Department has compromised the amount of the penalty the Department believes is warranted in this matter in the spirit of cooperation and the desire to resolve this matter amicably, without incurring the unwarranted expense of litigation.

H. The civil penalty is summarized in Attachment 1.

#### ORDER

Therefore, the Operator, along with the Department, desires to resolve and settle the compliance issues cited above. The Department has carefully considered the facts available to the Department and has considered the six penalty factors enumerated in Ala. Code § 22-22A-5(18)c. (2006 Rplc. Vol.), as well as the need for timely and effective enforcement,

The Department believes that the following conditions are appropriate to address the violations alleged herein. Therefore, the Department and the Operator agree to enter into this Consent Order with the following terms and conditions:

A. The Operator agrees to pay to the Department a civil penalty in the amount of \$10,000.00 in settlement of the violations alleged herein within forty-five days from the effective date of this Consent Order. Failure to pay the civil penalty within forty-five days from the effective date may result in the Department's filing a civil action in the Circuit Court of Montgomery County to recover the civil penalty.

B. The Operator agrees that all penalties due pursuant to this Consent Order shall be made payable to the Alabama Department of Environmental Management by certified or cashier's check and shall be remitted to:

Office of General Counsel  
Alabama Department of Environmental Management  
PO Box 301463  
Montgomery, Alabama 36130-1463

C. The Operator agrees to take immediate action to prevent, to the maximum extent practicable, sediment and other pollutants in stormwater leaving the Facility and prevent noncompliant and/or unpermitted discharges of pollutants to waters of the State.

D. The Operator agrees that, within five days of receipt of this Order, the Operator shall have a QCP perform a comprehensive inspection of the Facility, offsite conveyances, and affected State waters.

E. The Operator agrees that, within ten days of receipt of this Order, the Operator shall submit to the Department a CBMPP, prepared/certified by a QCP, detailing effective BMPs that meet or exceed the technical standards outlined in ADEM Admin. Code chap. 335-6-12 and the Alabama Handbook.

F. The Operator agrees that, within thirty days of receipt of this Order, the Operator shall fully implement effective BMPs, designed by a QCP, that meet or exceed the technical standards outlined in the Alabama Handbook, the site CBMPP plan, and ADEM Admin. Code chap. 335-6-12, and correct all deficiencies at the Facility and offsite conveyances, including sediment removal or remediation.

G. The Operator agrees that, within seven days of the completion of the activities required in Paragraph F. above, the Operator shall submit to the Department a certification signed by the QCP that effective BMPs that meet or exceed the technical standards outlined in the Alabama Handbook, the site CBMPP plan, and ADEM Admin. Code chap. 335-6-12 have been implemented, all deficiencies have been corrected, and full compliance with the requirements of ADEM Admin Code chap. 335-6-12, has been achieved at the Facility, offsite conveyances, and affected State waters.

H. The Operator agrees that, after the effective date of this Consent Order, it shall pay stipulated penalties for each day it fails to meet any of the milestone dates or to satisfy any of the requirements set forth in or established by paragraphs A, D, E, F, and G contained herein or any other requirement date, except for *Force Majeure* acts as hereinafter defined, shall be as follows:

Period of Noncompliance	Penalty per Day per Violation
1 <sup>st</sup> to 30 <sup>th</sup> day	\$100
31 <sup>st</sup> to 60 <sup>th</sup> day	\$200
After 60 days	\$300

If the Operator fails to meet any milestone or any assigned date for a period of ninety days after any required date described in paragraphs A, D, E, F, and G then the Department reserves the right to file a new action against the Operator.

I. The Department and the Operator (hereinafter collectively "the Parties") agree that the cumulative stipulated penalties described in Paragraph H. above shall under no circumstances exceed \$12,000.00. Once stipulated penalties of \$12,000.00 are due to the Department and violation(s) continue to occur, then the Department shall be free to issue additional orders or to file suit against the Operator in the Circuit Court of Montgomery County or in another court of competent jurisdiction to enforce compliance of this Consent Order.

J. The Operator agrees to submit payment of stipulated penalties, as described in Paragraph H., to the Department so that they are received by the Department no later than thirty days following the completion of the milestone or requirement. Notification to the Operator by the Department of the assessment of any stipulated penalty is not required.

K. The parties agree that this Consent Order shall apply to and be binding upon both parties, their directors, officers, and all persons or entities acting under or for them. Each signatory to this Consent Order certifies that he or she is fully authorized by the party he or she represents to enter into the terms and conditions of this Consent Order, to execute the Consent Order on behalf of the party represented, and to legally bind such party.

L. The Parties agree that, subject to the terms of these presents and subject to provisions otherwise provided by statute, this Consent Order is intended to operate as a full resolution of the violations which are cited in this Consent Order.

M. The Operator agrees that the Operator is not relieved from any liability if the Operator fails to comply with any provision of this Consent Order.

N. For purposes of this Consent Order only, the Operator agrees that the Department may properly bring an action to compel compliance with the terms and conditions contained herein in the Circuit Court of Montgomery County. The Operator also agrees that in any action brought by the Department to compel compliance with the terms of this Agreement, the Operator shall be limited to the defenses of Force Majeure, compliance with this Agreement and physical

impossibility. A Force Majeure is defined as any event arising from causes that are not foreseeable and are beyond the reasonable control of the Operator, including the Operator's contractors and consultants, which could not be overcome by due diligence (i.e., causes which could have been overcome or avoided by the exercise of due diligence will not be considered to have been beyond the reasonable control of the Operator) and which delays or prevents performance by a date required by the Consent Order. Events such as unanticipated or increased costs of performance, changed economic circumstances, normal precipitation events, or failure to obtain federal, state, or local permits shall not constitute Force Majeure. Any request for a modification of a deadline must be accompanied by the reasons (including documentation) for each extension and the proposed extension time. This information shall be submitted to the Department a minimum of ten working days prior to the original anticipated completion date. If the Department, after review of the extension request, finds the work was delayed because of conditions beyond the control and without the fault of the Operator, the Department may extend the time as justified by the circumstances. The Department may also grant any other additional time extension as justified by the circumstances, but the Department is not obligated to do so.

O. The Department and the Operator agree that the sole purpose of this Consent Order is to resolve and dispose of all allegations and contentions stated herein concerning the factual circumstances referenced herein. Should additional facts and circumstances be discovered in the future concerning the Facility which would constitute possible violations not addressed in this Consent Order, then such future violations may be addressed in Orders as may be issued by the Director, litigation initiated by the Department, or such other enforcement action as may be appropriate, and the Operator shall not object to such future Orders, litigation or enforcement action based on the issuance of this Consent Order if future orders, litigation or other enforcement action address new matters not raised in this Consent Order.

P. The Department and the Operator agree that this Consent Order shall be considered final and effective immediately upon signature of all parties. This Consent Order shall not be appealable, and the Operator does hereby waive any hearing on the terms and conditions of same.



Q. The Department and the Operator agree that this Consent Order shall not affect the Operator's obligation to comply with any federal, State, or local laws or regulations.

R. The Department and the Operator agree that final approval and entry into this Consent Order are subject to the requirements that the Department give notice of proposed penalty Orders to the public, and that the public have at least thirty days within which to comment on the Consent Order.

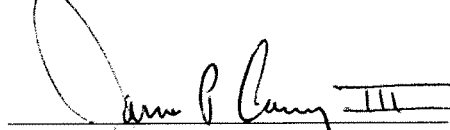
S. The Department and the Operator agree that, should any provision of this Consent Order be declared by a court of competent jurisdiction or the Environmental Management Commission to be inconsistent with federal or State law and therefore unenforceable, the remaining provisions herein shall remain in full force and effect.

T. The Department and the Operator agree that any modifications of this Consent Order must be agreed to in writing and signed by both parties.

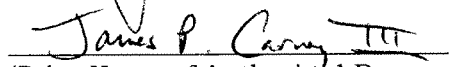
U. The Department and the Operator agree that, except as otherwise set forth herein, this Consent Order is not and shall not be interpreted to be a permit or modification of an existing permit under federal, State or local law, and shall not be construed to waive or relieve the Operator of the Operator's obligations to comply in the future with any permit coverage.

Executed in duplicate with each part being an original.

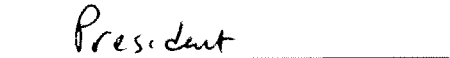
HERITAGE CONSTRUCTION COMPANY INC



(Signature of Authorized Representative)



(Print Name of Authorized Representative)



Title

Date Signed: 6/30/11

ALABAMA DEPARTMENT OF  
ENVIRONMENTAL MANAGEMENT

\_\_\_\_\_  
Lance R. LeFleur  
Director

Date Signed: \_\_\_\_\_

**Attachment 1**  
**Penalty Calculation Worksheet**

**HERITAGE CONSTRUCTION COMPANY INC**

<b>Violation</b>	<b>Number of Violations</b>	<b>Seriousness of Violation &amp; Base Penalty*</b>	<b>Standard of Care*</b>	<b>History of Previous Violations*</b>
Commencing and continuing NPDES construction activity without having implemented effective BMPs...	2	\$6,000	\$1,500	
Failure to remove sediment	2	\$10,000	\$2,500	
<b>Totals:</b>	<b>4</b>	<b>\$16,000</b>	<b>\$4,000</b>	<b>\$0</b>
<b>Economic Benefit*:</b>				<b>\$3,500</b>
<b>Mitigating Factors:</b>				<b>\$0</b>
<b>Ability to Pay*:</b>				<b>\$0</b>
<b>Other Factors*:</b>				<b>(\$13,500)</b>
<b>Final Penalty:</b>				<b>\$10,000.00</b>

\* Refer to the "Findings" of the Order for a description of each penalty factor